

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
Toronto Asia Tele Access Telecom)	IB Docket No. 11-58
Petition for Declaratory Ruling Regarding)	
Application of Sections 214 and 254 to)	
International Providers of VoIP Peering)	
and Distribution of Private Label Prepaid)	
Calling Cards)	

REPLY COMMENTS OF TORONTO ASIA TELE ACCESS TELECOM

Toronto Asia Tele Access Telecom (“TATA Telecom” or “Petitioner”) files its Reply Comments in this proceeding. The only comments filed in response to the Commission’s public notice calling for comments on Petitioner’s February 10, 2011 Petition for Declaratory Ruling (“Petition”), were those of Tata Communications (America) Inc. (“Tata-Com”). As such, as will be shown herein, the request that the Commission issue a declaratory ruling clarifying that Petitioner has been lawfully operating in the U.S. since 2006 is unopposed. The ruling requested by Petitioner should therefore be issued by the Commission, as requested.

Tata-Com Lacks Standing - Its Comments are Self-Serving and Irrelevant

Tata-Com’s comments contain no facts, argument or supporting precedents relevant to the sole issue presented by the Petition. Rather, Tata-Com claims that the purpose of the Petition is to delay the ongoing litigation between its parent company, Tata Sons Limited (“TSL”) and TATA Telecom.¹ Tata-Com is not a party to that litigation. It has not participated in any way in that litigation. However, the issue of the “lawfulness” of Petitioner’s operations is central to TSL’s position in that litigation, and TSL has made it the dispositive issue for resolution in that case.

¹ *Toronto Asia Tele Access Telecom Inc. and Manmohan Singh Thamber v. Tata Sons Limited*, Case No. CV 09-01356 RSM (W.D. Wash. filed Sept. 29, 2009) (“Washington Litigation”).

Hence, the real parties-in-interest in the resolution of the “lawfulness” issue are Petitioner and TSL. It is recognized that commentators responding to the Commission’s call for comments on an issue of public importance, implicating not only the private interests that may be involved, but potentially broader public interests, are not necessarily required to meet the criteria of real parties-in-interest. But, here, Tata-Com has not filed comments on the important legal issue that demands the exercise of the Commission’s expertise. Tata-Com has simply expressed its parent’s self-serving interest in pursuing its litigation with TATA Telecom. Comments deriding the declaratory ruling process and the Commission’s handling of the process do not address the public interest factors inherent in the declaratory ruling Petitioner has rightfully sought to obtain.

The Petition Raises Issues of Public Importance

The Petition raises an issue of public importance beyond the private interests involved in the Washington Litigation. The Petition seeks clarification of the boundaries of Commission jurisdiction and authority. And if those boundaries are indeed thought to reach Petitioner at each discrete phase of its operations, the Petition asks whether the Commission should exercise jurisdiction in such a manner as to render each discrete phase of Petitioner’s operations unlawful. Or, in the alternative, the Petition asks the Commission to consider whether forbearance would best serve the public interest and/or whether, given the complex regulatory policies,² application of jurisdiction would, under the circumstances, constitute a regressive action that emphasizes form over substance.

It is clear therefore that a ruling on the Petition would provide much needed clarity regarding the regulatory treatment of Petitioner’s and like-kind services. A ruling would achieve the purpose intended for these types of proceedings, aiding the court in its administration

² Such policies are made all the more difficult by the rapid evolution and advances in technology during Petitioner’s operations.

of justice over private interests by applying the Commission's determination of the public interest and how those public interests should shape and define private interests.

The Issues In Question

As outlined in the Petition, one of the key questions before the court in the Washington Litigation is whether TATA Telecom has infringed on TSL's trademark. The issue before the court is whether Petitioner's first use of the name, two years prior to TSL's claimed first use, affords it rights to the name.³ Lacking facts to support a claim of first use, TSL raised questions about the "lawfulness" of Petitioner's use, thus making "lawfulness" a predicate, and therefore, central issue. To confer rights of first use, TSL argues that Petitioner's use of the name in connection with its U.S. operations must have been and continue to be lawful. And this is why the court requires the Commission's assistance. Without such aid, the court would be left to interpret a long history of the Commission's communications regulations, rules, and orders which lack any clear and unambiguous application to Petitioner's services and service delivery models. To ensure harmony between the judicial and regulatory schemes, the Commission must act to aid the court and make a clear declaration as to the lawfulness of the Petitioner's operations.⁴ In these circumstances, Petitioner's filing for a declaratory ruling and a motion for a stay of the Washington Litigation pending a ruling by the Commission on the issue is not only standard procedure, but a most necessary one.⁵

³ "TATA" was selected because it is the acronym for Toronto Asia Tele Access. The ubiquitous "Telecom" was added later.

⁴ As the expert body with power to interpret its own rules and orders, the FCC is the only authority that can provide commanding guidance in this situation.

⁵ The court is fully aware of the Petition, and recently issued an order indicating that it is interested in the Commission's actions in the above-captioned proceeding. *Toronto Asia Tele Access Telecom Inc. and Manmohan Singh Thamber v. Tata Sons Limited*, Case No. CV 09-01356 RSM (W.D. Wash. filed Sept. 29, 2009), Order on Plaintiffs' Motion to Supplement Plaintiffs' Motion to Stay (Dkt. #55) (filed May 6, 2011). See Exhibit A, attached hereto.

Tata-Com's Position Eliminates the Declaratory Ruling Process

If the Commission accepts Tata-Com's position that it should decline to address the Petition merely because exercising its authority would delay the Washington Litigation, then the Commission, and for that matter every other agency of government, would never issue declaratory rulings when litigation is pending. But it is precisely when litigation is pending that agency referrals are of the utmost importance, as the doctrine of primary jurisdiction establishes. In these cases, delay is inevitable and indeed warranted.⁶ This case is no different. The invaluable clarity of the Commission's guidance far outweighs any slight delay that would result from the Commission's consideration of the issues.⁷

Petitioner Provided Sufficient Facts for the Commission to Issue a Declaratory Ruling

The Petition provides the facts necessary for a Commission ruling. Petitioner explained the nature of its operations with detailed descriptions of both its prepaid calling card distribution and VoIP peering calling services.⁸ Tata-Com ignores these facts and attacks Petitioner for failure to describe its operations to its satisfaction.⁹ In any event, the Commission has declined

⁶ Similarly, to accept Tata-Com's position that because the court could potentially deny the motion to stay and move forward with the suit, the Commission should decline to address the Petition, would be absurd. If the Commission took this approach, it would never rule on any petition for declaratory ruling where the ruling sought relates to a subject of ongoing litigation put before the Commission pursuant to its primary jurisdiction.

⁷ It is noted that Tata-Com cannot cite any prejudice that it would suffer as a result of any such delay. But it is all the more telling that it made no attempt to cite any prejudice TSL might suffer. It merely claims, without a shred of support, that Petitioner will "continue to reap profits from its harmful infringement of [TSL's] trademark and confuse Tata's customers."

⁸ Petitioner described, for example, its founding, contractual arrangements with underlying carriers and its distribution of prepaid calling cards. In addition, it discussed its current offerings which rely upon VoIP peering arrangements, including, for example, a discussion of its network, websites and traffic exchange agreements. *See In the Matter of Petition for Declaratory Ruling Regarding Application of Sections 214 and 254 to International Providers of VoIP Peering and Distribution of Private Label Prepaid Calling Cards*, Toronto Asia Tele Access Telecom Petition for Declaratory Ruling, IB Docket 11-58 (filed Feb. 10, 2011) at pages iii-iv, 1-5, 9-11.

⁹ Tata-Com disingenuously uses documentation provided in the Washington Litigation. But Petitioner's invoices provide no indication that the services provided constitute traditional regulated

in the past to dismiss petitions not accompanied by an affidavit, and in fact, has issued detailed precedential rulings in certain cases. For example, in 2004, the Commission issued a well known order in response to a 2002 petition filed by AT&T seeking a declaratory ruling that its phone to phone IP telephony services were exempt from access charges.¹⁰ No declaration or documentation accompanied AT&T's petition, yet the Commission found the facts alleged, which include a similar (if not lesser) degree of detail as that presented by Petitioner, to be sufficient for a wide-reaching ruling addressing IP telephony services.¹¹

Petitioner Requires a Ruling from the FCC on the Regulatory Treatment of its Services

Contrary to Tata-Com's assertions, Petitioner requires Commission clarification on the regulatory treatment of its operations. Although the Commission has addressed in certain limited contexts the classification of prepaid calling cards generally, it has declined to clearly delineate the regulatory obligations applicable to those operations. When Petitioner initially entered the U.S. market in 2006, it distributed prepaid calling cards whose underlying service was provided by other carriers.

Distributors of prepaid calling cards are not and never have been regulated by the Commission. Therefore, in 2006, when Petitioner entered the market, the Commission did not regulate Petitioner – a prepaid calling card distributor.¹² Thus, Petitioner remains exempt from Commission regulation. The federal court in the Washington Litigation needs to know this.

telecommunications. Instead, the Petition provides a detailed description of the services Petitioner provides.

¹⁰ See *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361, 19 FCC Rcd 7457 (2004).

¹¹ See *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Petition for Declaratory Ruling, WC Docket No. 02-361 (Oct. 18, 2002).

¹² See, e.g., *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (rel. June 30, 2006); *AT&T Corp. Petition for Declaratory Ruling*

But this is but one of the issues on which the Petition asks the Commission to rule. Contrary to Tata-Com's self-serving assertions, Petitioner intends not merely to determine if it provides any of its services lawfully, but whether it provides all of its services lawfully. For the court to properly determine the scope of Petitioner's rights to the use of "TATA" as an acronym in the U.S., the Commission must first evaluate each of the services provided by Petitioner since 2006 in order to aid the court's deliberations.¹³ This includes both its prepaid calling card distribution and its calling services provided through VoIP peering arrangements. That such a ruling would affect non-parties to the Washington Litigation underscores the broader public interests involved and the need for the Commission's ruling. Therefore, both the Petitioner and the broader spectrum of like-kind entities and the public served by these entities, require a ruling so that a key legal determination in ongoing litigation does not create a conflict in law and thereby a private miscarriage of justice and public confusion.¹⁴

Regarding Enhanced Prepaid Calling Card Services, Order and Notice of Proposed Rulemaking, WC Docket No. 03-133, 20 FCC Rcd. 4826 (rel. Feb. 23, 2005).

¹³ See *CreAgri Inc. v. USANA Health Sciences Inc.*, 474 F.3d 626 (9th Cir. 2007). It is irrelevant, for these purposes, that Petitioner debates the soundness of the *CreAgri* decision because TSL has made it central to the Washington Litigation.

¹⁴ If the Commission determines that resolution of Petitioner's request would more appropriately be handled through another ongoing proceeding, Petitioner has no objection, provided, however, that such proceeding is resolved in a timely manner in order to allow the Washington Litigation to proceed without unreasonable delay.

Conclusion

For the foregoing reasons and those outlined in its Petition for Declaratory Ruling, Toronto Asia Tele Access Telecom respectfully requests that the Commission address its Petition for Declaratory Ruling, and issue the following rulings:

- (1) Petitioner has been lawfully operating since 2006 as a prepaid calling card distributor;
- (2) Petitioner has been lawfully providing its international services through its VoIP peering arrangements; and
- (3) Petitioner is not engaged in provisioning a communications service that requires a certificate of public convenience and necessity granted by the Federal Communications Commission pursuant to Section 214 of the Communications Act.

DATED this 16th day of May, 2011.

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